Michigan Timber & Truss, Inc. ***and*** **Patrick T. Raquepaw.** Case 7–CA–40380

May 21, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND BRAME

On July 27, 1998, Administrative Law Judge C. Richard Miserendino issued the attached decision. The Charging Party filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Jeffrey Wilson, Esq., for the General Counsel.
David Jerome, Esq., of Troy, Michigan, for the Respondent.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

C. RICHARD MISERENDINO, Administrative Law Judge. This case was tried in Detroit, Michigan, on June 17, 1998. The charge was filed on November 3, 1997, and the complaint was issued on January 16, 1998. The complaint alleges that on November 3, 1997, the Respondent, by its shift foreman, James Bennett, violated Section 8(a)(1) of the Act by interrogating the Charging Party, an employee/union organizer, about his union activities, and by telling him that the Respondent did not need or want a union. The complaint further alleges that on November 3, 1997, the Respondent, by its shift foreman, James Bennett, unlawfully terminated the Charging Party because of his union activities in violation of Section 8(a)(3) and (1) of the Act. The Respondent filed a timely answer denying the material allegations of the complaint.

At the conclusion of the trial and following oral argument by counsel for the General Counsel and counsel for the Respondent, I issued a bench decision pursuant to Section 102.35(a) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. I found that the Charging Party was not credible for the reasons stated in the transcript. On the other hand, I credited the testimony of the shift foreman, James Bennett, which, in part, was corroborated by another witness. I found that Bennett did not interrogate the Charging Party about his union activities. Rather, the evidence showed that after distributing union flyers outside the Respondent's facility before work, the Charging Party entered the building, clocked in for work, and stopped to talk to two day-shift employees who were on worktime at their work stations. When Bennett saw that the Charging Party with the union flyers talking to the two employees, he asked the Charging Party to put the union flyers in his car and to get to work. Upon returning from his car, Charging Party stopped again to talk to one of the day-shift employees, when Bennett asked him again to get to work. As Bennett and the Charging Party walked down a hall toward the saw area, the Charging Party began telling Bennett about the Union. For demeanor, and other reasons stated in the transcript, I credit Bennett's testimony that that he did not ask questions about the Union or the Charging Party's union activities. Instead, the evidence shows that Bennett sought to curtail the conversation by telling the Charging Party to get to work and, in the course of the conversation, Bennett stated that the Respondent did not need or want a union. Thus, I concluded that in the context in which the conversation occurred there was no violation of Section 8(a)(1) of the Act.

I also found that in the context of the same conversation, Bennett did not terminate the Charging Party. The credible evidence shows that Bennett unsuccessfully attempted to end the conversation by asking the Charging Party to return to work. He finally told him that he could either go back to work or leave at which time the Charging Party left. For demeanor, and other reasons stated in the transcript, I was unpersuaded by the Charging Party's testimony that Bennett pointed to the door and in an angry voice told him to take his union hat and go back to his union job. The evidence shows that only minutes before, Bennett calmly approached the Charging Party, asked him to put the union leaflets in his car, and told him to go to work. He did not reprimand or discipline the Charging Party for disturbing the working employees, he did not attempt to confiscate the union material, and there is no evidence that he said anything to the working employees about their conversation with the Charging Party. I therefore concluded that no violation of Section 8(a)(3) of the Act occurred.

In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.[1]

[1] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Contrary to the judge, Member Brame would find that the statement made by Shift Foreman James Bennett to the Charging Party to the effect that the Company did not need or want a union was not a personal opinion. Rather, Member Brame would find that Bennett's statement, although attributable to the Respondent, is clearly lawful under Sec. 8(c) of the Act. Sec. 8(c) specifically provides that "[t]he expressing of any views, argument, or opinion, or dissemination thereof . . . shall not constitute or be evidence of any unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." See *Medeco Security Locks v. NLRB,* 142 F.3d 733, 744 (4th Cir. 1998), citing *Alpo Pet Foods v. NLRB,* 126 F.3d 246, 252 (4th Cir. 1997). Here, according to credited testimony, the Charging Party initiated the conversation about the Union by explaining to Bennett what a union could do for the employees in terms of higher wages and better benefits. Bennett's reply merely represented the Respondent's opinion about unions. Chairman Truesdale and Member Hurtgen agree that the remark did not violate Sec. 8(a)(1). In this regard, they rely on all of the circumstances, including the personal nature of the remarks and the substance thereof.

[1] Appendix B sets forth certain corrections to the transcript where the text does not conform to my notes. [Certain corrections to the transcript have been noted and corrected and Appendix B is omitted from publication.]

CONCLUSIONS OF LAW

The Respondent has not violated the Act in any manner alleged in the complaint.

ORDER[2]

The complaint is dismissed.

APPENDIX A

102

I'm going to recess until 1:45 PM. I'll come back and give a bench decision.

(A brief recess.)

JUDGE MISERENDINO: On the record. I am prepared to render an oral decision.

I'll take care of the procedural matters first. This charge was filed on November 3, 1997. A complaint issued on January 16, 1998. Complaint alleges that the Respondent. Michigan Timber and Truss, Inc., on November 3, 1997 violated section 8(a)1 of the Act by through its agent's supervisor James Bennett by interrogating the Charging Party, Patrick Raquepaw, about his union activities and telling him that the Respondent did not want a union on the premises.

The complaint also alleges that the Respondent violated Section 8(a)3 of the Act on November 3, 1997 by terminating the Charging Party, Patrick Raquepaw because he assisted the union, engaged in concerted activities and engaged in activities—and terminated him to discourage employees from engaging in union activities.

Respondent filed a timely answer in this complaint. Counsel for the parties have already stated their appearances on the record, so I need not go over that.

With respect to jurisdiction, the Respondent is a corporation with an office and place of business in

103

Troy, Michigan and has been engaged in the manufacture of roof trusses and floor trusses.

During the calendar year ending December 31, 1997, the Respondent in conducting it's business operations at the above location derived gross revenues in excess of $500,000.

During the calendar year ending December 31, 1997, the Respondent in conducting its business operations purchased and received at its Troy facilities, goods valued in excess of $50,000 directly from points outside the state of Michigan.

Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section (2), (6), and (7) of the Act.

Respondent admits and I find that the local 1045, Interior Systems Carpenters Union, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

Respondent admits and I find that Robert French and James Bennett are supervisors within the meaning of Section 2(11) of the Act and agents within the Section—the meaning of Section 2(13) of the Act.

Now I'll turn to the facts of the case. The evidence discloses that the Respondent is a wholesale

104

manufacturer of trusses in the Troy tri-county area. It manufacturers trusses for the use in support of roofs and floors.

It employs approximately 45 to 59 production employees as well as approximately 10 office clericals.

The Charging Party, Patrick Raquepaw, is a member of local 1045 and for approximately the past year has been an organizer with the union.

On or about October 20, 1997, Charging Party submitted an application for employment to the Respondent. He underwent a physical and shortly thereafter he was hired and began to work for the Respondent on October 23, 1997 as a taller for a web saw. He essentially was a helper for a web saw operator by the name of Mr. John Miller.

He was assigned to the second shift, 2:00 p.m. to 10:00 p.m. His supervisor on the second shift was shift foreman James Bennett.

After the Charging Party was hired, he spoke to approximately fifteen employees on one or two occasions about the union. These discussions occurred before work as employees approached the employer's facility.

According to Mr. Raquepaw's testimony, prior to November 3, 1997, no supervisors knew of his union activities, he did not pass out any union literature and

105

he did not wear any union paraphernalia.

On November 3, 1997, approximately twenty minutes before the second shift began at 2:00 p.m., Mr. Raquepaw stood in front of the employer's property on the public easement and distributed a union leaflet which gave wage comparisons. He was wearing a union hat and a shirt

After passing out the literature to approximately 15—after passing out approximately 15 fliers, he entered the building to punch in to go to work around 2:00 p.m.

On entering the building he was approached by a second shift foreman Mr. James Bennett. It's at this point that the testimony, as given by Mr. Raquepaw and Mr. Bennett diverges.

According to the Charging Party's testimony, Bennett came up to him with a flier in his hand and told him to put the fliers in his car. Charging Party responded "Yeah, but I don't want to be late." And Mr. Bennett then said ''Don't worry about it."

So he went outside and he came back. When he came back in, Bennett approached him again, and asked him what he was doing. Charging Party testified that he said he was on his way to his work. This conversation took place by the cafeteria.

At that point, Bennett said ''What is this union stuff all about?"

106

Charging Party said, testified that it was something that will help the guys. According to Raquepaw, testified at that point that Mr. Bennett became upset and he stated "We don't need a union around here. We don't want a union and we don't need a union around. here."

Raquepaw said that this would be good for the guys. At that point Mr. Bennett became more upset and he said "Take your union hat and shirt and go back to the union job.["] He did this while he was pointing to the door. He said it in a loud voice and he was visibly upset.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Mr. Raquepaw at that point left the building.

According to Mr. Bennett, he testified that on November 3rd, before the second shift began, the saw cutter, John Miller, came into the office. He told him that Raquepaw was outside in the parking lot passing out union fliers to bring in a union.

At that point Miller asked him what was going on. Bennett testified that he responded to Miller that he did not know and Miller left the office.

Then he further testified that from inside the office, which was located in the center of the shop floor, which has glass windows all around, he could see Raquepaw enter the building, and he stopped to talk to a Scott—whose name I still cannot—I don't have a

107

proper spelling on—and Brian Florence, who were two shift operators, employees who were still on the clock.

At that point Bennett testified he walked out of the office and over to Raquepaw and asked him what he was doing. He noticed that Raquepaw had some fliers in his hand which he was trying—it appeared he was trying to hide them behind his back.

Bennett said to Raquepaw ''Go out and put the fliers in your car.''

Raquepaw left the facility and went out to his car and came back in.

Bennett testified that when he told Raquepaw to go out to the car, he noticed that he was wearing a union hat, but he could not remember seeing a union shirt or he could not remember seeing a union jacket.

Raquepaw left the building and came back. And at that time, Bennett, the foreman, was standing by the tables in the line 1 area. When Raquepaw came back into the building, he stopped to talk to Brian Flores again. At that point Bennett testified that he went up to him again and asked him ''What are you doing? Let's get to work."

The two then started to walk down a hall towards the cafeteria which is on its way to the saw cut area. According to Bennett, Raquepaw started talking about the

108

union. He began to explain what it could do for the guys—for the employees in terms of higher wages and better benefits.

Bennett then said to Raquepaw "We don't need a union. We don't want a union, and we don't want need a union."

Raquepaw kept talking about the union and it's benefits. Bennett described their conversation as one in which there was no hostility. They were talking in a loud voice because of the machines. But there was no anger involved.

Finally, he told Raquepaw to either go back to work or leave at which point Bennett testified that Raquepaw said "I choose to leave."

He then walked toward the door, took off his union hat and threw it to one of the employees on the first line.

After that incident, after Raquepaw left the building, Raquepaw testified that he want back to the union hall to explain what occurred and he returned to the employer's facility one or two times in the next two weeks to talk to the guys.

Bennett went to the first shift supervisor, Bob French, and told him what happened. He told French that he gave Raquepaw the choice of either going or staying

109

and Raquepaw chose to leave.

French went to the CEO, part-owner, Jeffrey Van Every, and told him what had occurred. Van Every testified that that was the first time he knew of the incident that took place on November 3, 1997.

Turning to the unfair labor practice portion of the case, Section 8(a)1 violation. Section 7 of the Act guarantees employee's the right to self organize, to form, join or assist labor organizations, bargaining collectively through representatives of their own choosing, to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection.

Section 8(a)1 prohibits employer's interference, restraint or coercion of employees exercising their rights guaranteed by Section 7.

With respect to the Section 8(a)1 violation, case either rises or falls on a credibility determination of Mr. Raquepaw and Mr. Bennett.

I credit Mr. Bennett's testimony as to what he said he said prior to Mr. Raquepaw leaving on November 3rd. That is, that Mr. Raquepaw initiated the conversation about the union, that Bennett said to him ''We don't want or need a union around here, and that Raquepaw continued talking about the union."

110

I credit Mr. Bennett's testimony because of omissions and contradictions in Mr. Raquepaw's testimony. Specifically, in going over the evidence I note that Mr. Raquepaw, in testifying, omitted the fact that he had fliers in his possession when he came into the building.

And that he attempted to hide them behind his back when he was approached by mr. Bennett. He also omitted to testify that he stopped to speak to Brian Flores and Scott the first time he came into the building, and he omitted to testify that he stopped to talk to Brian Flores the second time he came into the building.

While these omissions many not seem of anything of consequence, they suggest to me that he was prone not to tell—not that he was not telling the truth, but he wasn't telling the whole truth. He wasn't giving us the whole story when he was testifying.

I also find him incredulous to the extent that his testimony was contradicted by John Miller. John Miller is no longer employed by the employer. He didn't come here with any particular motive or ax to grind, so to speak.

Mr. Miller testified that when he was handing out the leaflets on November 3, 1997, just prior to the second shoift starting, that he handed one to John Miller

111

and he told him ''Something is going to happen today."

Mr. Raquepaw testified he didn't elaborate anything further. And he specifically denied telling Miller that he was going to be fired.

Miller, on the other hand, testified that when he came to work on November 3rd he was driven in a car by his mother, or mother-in-law and as he pulled up Raquepaw approached the vehicle and extended his hand and said ''So long, it was good working with you. I'll probably be fired today. I'm a union organizer."

That goes far beyond what Mr. Raquepaw testified he said to Miller on that day.

And it also directly contradicts his statement that he did not say he was going to be fired.

Miller also contradicted Raquepaw in another respect. Miller testified that after November 11th for two weeks, almost on a daily basis, Raquepaw appeared at the employer's facility where he attempted to talk to Miller and others about the union.

He gave an example of following him to a convenience store during their lunch break. Miller testified that he became, almost—such a daily time that he felt he was being harassed and he was considering filing charges for harassment.

This is inconsistent with Mr. Raquepaw's testimony

112

that he was there only two or three times in the two period just talking to the guys.

Again, it suggests to me that he was less than fully candid in his testimony in telling the entire story and had a tendency to downplay significant aspects of his testimony.

I credit Mr. Bennett that it was Charging Party Raquepaw, not he, that initiated the conversation about the union, because on November 3rd, I think that was the mode of operation for Mr. Raquepaw. He was there to tell everyone about the union.

That was the intent, to pass out the fliers, to talk to the employees. That's what he attempted to do to Brian Flores and also to Scott initially when he entered the facility. And also with respect to Brian when he came back the second time.

I think it's very plausible, though, in that vein, that he tried to convince his supervisor the benefits of union organizing when the two of them were walking down the hall by the cafeteria.

He is the one—I find that he is the one that initiated the conversation.

I credit Mr. Bennett's testimony that he denied asking "What's this union stuff all about?"

In this connection I look at his comment in the

113

totality of the circumstances. The testimony is that when he first approached Mr. Raquepaw the first time, he simply asked him to put—asked him what was going on and asked him to put the literature in the car.

He didn't ask—he didn't confiscate the literature. He didn't try to take it away from him. He didn't tell him not to talk to any of the employees. He just said to put it in the car, to put it away.

That would have been an ideal time to make an inquiry as to what the union stuff was all about or go any further about why he was trying to organize and he didn't do any of those things.

The testimony is—and Mr. Raquepaw's testimony is, that he just came up to him and asked him to put it in his car and then Mr. Raquepaw expressed a concern about being late to which Mr. Bennett responded "Don't worry about that. Just go put it in your car and come on back and punch in."

There was no hostility. There was no anger in that conversation. And I think that would have been the step off point to making a inquiry about the union and it didn't occur at that point.

With respect to the conversation that happened outside the cafeteria, I think it's very important to look in the context in which that conversation arose.

114

It was a casual conversation. It was open. It was in a hallway outside a public area; public, in the sense that it was a cafeteria that's frequented by the employees.

And I credit Mr. Bennett's testimony that it was initiated by Mr. Raquepaw, again, because that was something that he was attempting to achieve that day was talk up the union and get people interested in it.

And I think he continued that when he came back into the building.

Again, there was at that point no attempt to confiscate any literature or stifle the conversation. I think it arose in a casual conversation. And the opinions—the statement by Mr. Bennett that ''We don't need a union, we don't want a union." I view that and I find that that was his personal opinion.

The evidence in this case shows that there was never any conversation by Mr. Van Every with his foremans as to how they were supposed to deal with the union. There was no conversation about the union at all, whether he was for it or against it.

He said at one point he may have expressed an opinion that he didn't think that they needed a union, but that didn't occur within a six month time before November 3rd and he was unsure when it happened.

115

There's no testimony elicited through Mr. Bennett that contradicts that statement.

And I think he was expressing his personal opinion and not necessarily the opinion of the employer but it arose in a casual contact in a conversation that was initiated by Mr. Raquepaw.

For these reasons I shall recommend that the allegation of paragraph 11 of the complaint, that the Respondent violated Section 8(a)(1) of the Act be dismissed.

Now turning to the 8(a)(3) alleged violation. Section 8(a)3 prohibits an employer from discriminating in regard to an employee's tenure of employment, to encourage or discourage membership in any labor organization.

In *Write Line,* 251 NLRB 1083 (1980),—and I'll omit the rest of the citations—the Board established an analytic framework for deciding discrimination cases turning on employer motivation.

Essentially, General Counsel has—must establish—has the burden of establishing at least initially, protected activity, of knowledge, animus or hostility, and adverse action on behalf of the employer which tends to encourage or discourage protected activity.

The burden then shifts to the employer to

116

persuasively establish by a preponderance of evidence that it would have made the same decision even in the absence of protected activity.

With respect to the protected conduct, I don't think there's any question and certainly neither side has argued that there wasn't any protected conduct here. I think the distribution of the leafleting and the attempts to talk to the employees clearly constitutes protected conduct.

With respect to the knowledge element, certainly on November 3rd, the evidence showed that the second shift, Mr. Bennett, had knowledge of Mr. Raquepaw's union activity. That was for the first time.

Mr. Bennett also testified that he had the authority to hire and fire. Whether or not Mr. McEvery was aware of it or not, at least his first line supervisor, who had the authority to make a decision, and in this case, allegedly did make that decision, was

aware of the union activity. So I think that there is evidence of knowledge.

Turning to the evidence of animus, I think you have to look at—it's very important to look at the entire context of the case. Again, initially when Mr. Raquepaw went into the building, came into the building, I note that the union literature was not confiscated. He was

117

not discouraged from talking to any of the other employees in the sense by being told to do that. There was no threat implied or implicit of any type of action if he continued to do it.

He was simply told to take the information back, to his car and come back into work and punch in.

The animus, if there is any animus, is contained in the statement ''We don't need a union and want a union." Because it was made by a person who had the authority to hire and fire. And it certainly shows opposition to the union by a person in that capacity.

Although, I think that's somewhat of a thin reed as far as animus goes I do feel that the evidence does support an inference of animus in this case.

That brings us to the last element which is adverse action. And here again the testimony diverges. The testimony of Mr. Raquepaw was the Mr. Bennett told him ''We don't want a union or need a union. Take your union hat and go back to your union job."

At which point Mr. Raquepaw interpreted that as he was being told that he was fired and he left. There's no evidence here that anyone used the word ''Fired" or anyone said that you're through or anything to that extent. Mr. Bennett's testimony was that Mr. Raquepaw as I found, engaged him a conversation about the union

118

and he told him that we didn't need and we don't want a union.

That Mr. Raquepaw continued to try to persuade him about the merits of joining a union and at which point he gave—he told him either you can go back to work or you can leave.

The inference there being that he had discussed enough about the union and it was time to get back to work. At which time Mr. Raquepaw chose—said ''I choose to leave."

I credit the testimony of Mr. Bennett. I find it a little implausible that Mr. Raquepaw would not ask for a better, clearer definition of what Mr. Bennett was telling him if he told him to take his union hat and job and go back to the union hall.

He didn't ask him if he was being fired. He didn't ask him for any type of explanation. He simply left the building.

Again, I look at the credibility resolutions that I made before, and particularly the omissions and the contradictions that I've alluded to before in making this determination.

The other factor that I take into consideration is the fact that if Mr. Bennett was inclined to fire Mr. Raquepaw I think the opportune time to do that would

119

have been in the first instance when he came into the building with the fliers and he was seen talking to the employees.

That would have been the time to turn him around and send him away and fire him. But, the evidence shows that's not what Mr. Bennett did. He simply asked him to take the information out to his car and he let him back into the building and he let him, at least begin to proceed to his work area.

To me, that's not conduct which is consistent with someone who is intending to or did fire somebody.

So, based on the evidence before me, I shall recommend that the allegations of the complaint with respect to Section 8(a)3 violation be dismissed as well.

As far as a conclusion goes, I recommend—I find that the complaint should be dismissed in its entirety.

Does anyone want to say anything before I close the record?

MR. JEROME: Nothing further, Your Honor.

JUDGE MISERENDINO: Nothing from the General Counsel?

MR. WILSON: No. Hank you

JUDGE MISERENDINO: Nothing from the union?

MR. NAHAT: Nothing. Thank you.

JUDGE MISERENDINO: This hearing is closed.

120

(Off the record)

(Whereupon, the hearing was concluded at 2:35 PM.)